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RECEIVABLES FINANCING

Revised articles of draft Convention

on Assignment in Receivables Financing: remarks and suggestions

Note by the Secretariat

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INTRODUCTION

1. At the present session, the Working Group on International Contract Practices continues its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the preparation of a uniform law on assignment in receivables financing. 1/ This is the sixth session devoted to the preparation of that uniform law, tentatively entitled the draft Convention on Assignment in Receivables Financing.

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). A related suggestion made at the Congress was for the Commission to resume its work on security interests in general, which the Commission at its thirteenth session (1980) had decided to defer for a later stage. 2/

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission discussed three reports prepared by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). Having considered those reports, the Commission concluded that it would be both desirable and feasible to prepare a set of

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1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

2/ Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28.

uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties. 3/

4. At its twenty-fourth session (Vienna, 13-24 November 1995), the Working Group commenced its work by considering a number of preliminary draft uniform rules contained in a report of the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of lower-cost credit (A/CN.9/420, para. 16).

5. At its twenty-ninth session (1996), the Commission had before it the report of the twenty-fourth session of the Working Group (A/CN.9/420). The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously. 4/

6. At its twenty-fifth and twenty-sixth sessions (New York, 8-19 July and Vienna, 11-22 November 1996), the Working Group continued its work by considering different versions of the draft uniform rules contained in the notes prepared by the Secretariat (A/CN.9/WG.II/WP.87 and A/CN.9/WG.II/WP.89 respectively). At those sessions, the Working Group adopted the working assumptions that the text being prepared would take the form of a convention (A/CN.9/432, para. 28) and would include private international law provisions (A/CN.9/434, para. 262).

7. At its thirtieth session (1997), the Commission had before it the reports of the twenty-fifth and twenty-sixth sessions of the Working Group (A/CN.9/432 and A/CN.9/434). The Commission noted that the Working Group had reached agreement on a number of issues and that the main outstanding issues included the effects of the assignment on third parties, such as the creditors of the assignor and the administrator in the insolvency of the assignor. 5/ In addition, the Commission noted that the draft Convention had aroused the interest of the receivables financing community and Governments, since it had the potential of increasing the availability of credit at more affordable rates. 6/

8. At its twenty-seventh and twenty-eighth sessions (Vienna, 20-31 October 1997 and New York, 2-13 March 1998), the Working Group considered the notes prepared by the Secretariat (A/CN.9/WG.II/WP.93 and A/CN.9/WG.II/WP.96 respectively). At its twenty-eighth session, the Working Group adopted the substance of draft articles 14 to 16 and 18 to 22, and requested the

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3/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

4/ Ibid., Fifty-first Session, Supplement No. 17 (A/51/17), para. 234.

5/ Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), para. 254.

6/ Ibid., para. 256.

Secretariat to prepare a revised version of draft article 17 (A/CN.9/447, paras. 161-164 and 68 respectively).

9. At its thirty-first session (1998), the Commission had before it the reports of the twenty-seventh and twenty-eighth sessions of the Working Group (A/CN.9/445 and A/CN.9/447). The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously so as to complete its work in 1999 and submit the draft Convention to the Commission for adoption at its thirty-third session (2000). 7/

10. In order to facilitate the considerations of the Working Group and to explain the provisions of the draft Convention, this note sets forth remarks on a number of draft articles. Where necessary, suggestions for alternative or additional provisions are made for consideration by the Working Group (e.g., draft articles 2, 18 and 23). This note also contains a revised version of draft article 17 and new article 17bis (dealing with proceeds issues), which has been prepared by the Secretariat further to a request by the Working Group (A/CN.9/447, para. 68).

* * *

DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

CHAPTER I. SCOPE OF APPLICATION

Remarks

Article 1. Scope of application

1. The alternative formulation for draft article 1(1), referred to in remark 2 to draft article 1 as it appears in document A/CN.9/WG.II/WP.96, should be completed by adding a reference to the connecting factor of the assignor's location. Thus, it should read: "This Convention applies to international assignments, if, at the time of the assignment, the assignor is located in a Contracting State". Such a reformulation of draft article 1(1) would need to be combined with the alternative wording for draft article 3 contained in the above-mentioned remark 2.

2. The Working Group may wish to consider the question whether parties to assignments not falling within the scope of the draft Convention or parties to original contracts not located in Contracting States should be given the right to opt into the draft Convention. It should be noted, however, that, if parties opt into the law of a Contracting State, it would not be clear whether they refer to the draft Convention or the domestic law of that State (see remark 4 to draft article 1 contained in A/CN.9/WG.II/WP.96).

3. In paragraph (2), draft articles 7, 12, 16 and 18 to 22 may be listed. The Working Group may wish to consider paragraph (3), dealing with the scope of the private international law rules of the draft Convention, contained in chapter VI, in the context of its discussion of chapter VI.

7/ Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), para. 231.

4. The Working Group may also wish to consider the question of the alternative or joint application of the substantive and private international law rules of the draft Convention raised in paragraph (4), which arises if a Contracting State makes a declaration under draft article 43. Under paragraph (4), if a Contracting State does not make a declaration under draft article 43, it retains its own priority rules adopting only the private international law priority rules of the draft Convention (i.e. draft articles 23 and 24).

* * *

Article 2. Assignment of receivables

1. Under the present formulation of draft article 2, the scope of the draft Convention would be too wide, covering almost the entire field of assignment law. While such an all-encompassing approach may be desirable from a dogmatic point of view, it may not be practically feasible to introduce a wholesale reform of national assignment law. Such an approach would reduce the acceptability of the draft Convention to those States, which would be prepared to introduce specific legislation for the purpose of facilitating access to lower-cost credit, but would not be prepared to consider a displacement of national assignment law as a whole. In addition, such an approach could be objected to by the representatives of those practices that seem to function well already and do not need to be regulated by yet another legal text. Moreover, under the present formulation of draft article 2, it would be impossible for any State to adopt a registration-based priority rule, since even in countries following such a system, not all the transactions covered in draft article 2 are subject to registration.

2. The scope of application of the draft Convention would be sufficiently wide even if paragraph (2), with the exception of subparagraph (a), were to be deleted. The Working Group may thus wish to combine paragraphs (1) and (2)(a), deleting the rest of paragraph (2) and possibly including some of the types of assignment listed in subparagraphs (b) to (g) in the list of exclusions contained in draft article 4. If the draft Convention becomes successful and widely adopted, its scope of application may always be broadened by way of a protocol.

3. As to the reference to consideration being given in return for the transfer of receivables, which is contained in paragraph 2(1) and is intended to ensure that only assignments of a financing nature are covered, the Working Group may wish to consider deleting it and excluding in draft article 4 assignments that are made without value, credit or related services being given or promised in return. In its present formulation, paragraph (1) suggests that consideration always flows from the transfer, which may not always be accurate. In addition, reference to value may raise the question whether "fair" value is meant.

4. It should be noted that draft article 2(1) is intended to cover all types of transfers of receivables by agreement, including contractual subrogation, novation and pledge. An indicative list of the types of contractual transfers covered, which appeared in a previous draft (A/CN.9/WG.II/WP.93, draft article 2(2)) was deleted with a view to avoiding creating the impression that transfers not listed were not covered (A/CN.9/445, para. 151).

5. Paragraph (3) may not be necessary, since draft article 13 sufficiently addresses issues relating to the transfer of rights securing the assigned receivables. In addition, paragraph (3) may be too

broad in that it equates any right arising under the original contract, including rights on confidential information, rights relating to the enforcement of other rights and security rights, to a receivable. Unlike the UNIDROIT Convention on International Factoring, Ottawa, 1988 (hereinafter referred to as "the Ottawa Convention"), from which paragraph (3) was drawn, the draft Convention deals with the transfer of property rights in receivables and it may not be appropriate to deal in such a broad way with the transfer of property rights in other assets (on this point, see remarks to draft articles 17 and 17bis).

6. Thus, the Working Group may wish to consider a revised version of draft article 2, which could read as follows:

"(1) For the purposes of this Convention, "assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of its right to payment of a monetary sum ("receivable"), arising under a contract between the assignor and the debtor[, whether the contract is for the sale or lease of goods, the provision of services or credit, the licensing of technology, intellectual property or information].

"(2) "Assignment" includes the transfer of property in receivables and the creation of rights in receivables as security for indebtedness or other obligation."

7. Under this formulation of draft article 2, the draft Convention would apply to assignments of contractual receivables (if the bracketed language contained in para. (1) is deleted) or to assignments of some types of contractual receivables only (if the bracketed language is deleted). Paragraph (2) is intended to ensure that both outright assignments and assignments by way of security are covered by the draft Convention (use of the words "outright" or "absolute" is avoided, since they may be meaningless in other languages and the word "transfer" may not be sufficient to reflect outright assignments, since, in some jurisdictions, assignments by way of security also involve a transfer of receivables).

* * *

Article 3. Internationality

1. The Working Group may wish to address the question whether the location of the parties is the appropriate criterion for determining the international character of a transaction or whether reference should be made to other criteria, such as the place in which a transaction may be negotiated, concluded or performed, or to no criterion at all, on the understanding that any element of internationality, e.g., a choice of foreign law or foreign currency, should be sufficient to render a transaction international. The present formulation of draft article 3 is based on the understanding that certainty with regard to the application of the draft Convention is of utmost importance since it may have a beneficial impact on the cost and the availability of credit.

2. The Working Group may also wish to address the question of internationality of a receivable or an assignment in the case of a multiplicity of assignors, assignees or debtors. An assignment to several assignees may occur, e.g., in the context of a syndicated loan. An assignment by several assignors may occur, e.g., in the context of a loan transactions involving several assignors from the same corporate group assigning their receivables (assignments of jointly owned receivables occur

rarely in practice and may not need to be addressed in the draft Convention). A multiplicity of debtors is normally involved in bulk assignments.

3. In the case of a multiplicity of assignors or assignees, an assignment or a receivable may be considered international even if only one assignor or one assignee is located in a country other than the country in which the other party to the transaction is located. Such an approach would allow assignors and assignees to plan in order to structure their assignment so that it would fall under the draft Convention or not. At the same time, however, it might open ways for manipulations in financing transactions (e.g., in a syndicate of banks, the leading bank could include in the transaction a foreign bank and thus bring the transaction within the scope of the draft Convention). On the other hand, the internationality of each assignment or receivable may be determined on whether it meets the criteria of internationality set forth in draft article 3. For example, in the case of a syndicate of assignees (lenders) of domestic receivables, with some assignees being domestic and some being foreign, only the assignment to a foreign assignee would be international and fall within the scope of the draft Convention. In view of the fact that, in syndicated loans, each lender receives its own promissory note from the assignor (borrower), such an approach would not be unusual and inconsistent results may be avoided, if domestic assignees opt into the draft Convention.

4. With regard to cases involving a multiplicity of debtors, covering bulk assignments involving both domestic and international receivables would not raise problems in the context of third-party effects, since, under draft articles 23 and 24, the law of the assignor's location would address all priority conflicts. In addition, unless the draft Convention applied even if one debtor were located in a country other than the assignor's country, it would be difficult to find an acceptable criterion to limit the application of the draft Convention. However, such an approach might inadvertently result in debtors being unable to predict whether the draft Convention would apply and possibly affect their rights and obligations. That result could be mitigated by the requirement that the draft Convention would not apply to a debtor, unless that debtor would be located in a Contracting State, and by including in the draft Convention an adequate debtor-protection system. In some practices, commingling receivables owed from debtors located in different countries may be avoided through the bundling of receivables based on the location of the debtor.

5. A related question is whether, in the case of a multiplicity of assignors, all of them need to be in a Contracting State for the draft Convention to apply. For that purpose, it should be sufficient if even only one assignor were located in a Contracting State. Otherwise, joint assignors could avoid the application of the draft Convention by including in the transaction an assignor located in a non-Contracting State. The same question would be raised as regards the application of those provisions of the draft Convention that deal with the rights and obligations of the debtor, in case of a multiplicity of debtors. In such a case, a different approach may be more appropriate in order to protect debtors from uncertainty as to the legal regime applicable to their rights and obligations, namely to require that all debtors need to be located in a Contracting State (for a brief discussion of these matters, see A/CN.9/445, paras. 156-159).

6. Another related question is whether an assignment to an agent or trustee, acting on behalf of several persons, some of which are domestic and some of which are foreign, should be considered as an assignment to the agent or trustee or as an assignment to all persons. It may be useful for the draft Convention to provide that an assignment to an agent or trustee acting on behalf of several

persons should be an viewed as an assignment to the agent or trustee, in order to avoid having to determine the location of all the parties represented by the agent or trustee.

* * *

Article 4. Exclusions

1. The Working Group may wish to consider listing in draft article 4 some of the transactions mentioned in draft article 2(2) and possibly other transactions, e.g., the assignment of the beneficiary's right to demand payment or the assignment of the proceeds of an independent guarantee or stand-by letter of credit covered by articles 9 and 10 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (hereinafter referred to as the "Guarantee and Standby Convention"). If certain of the transactions listed in draft article 2(2) are not excluded, the Working Group may wish to consider introducing special rules with regard to some of them. For example, if receivables arising from deposit accounts are not excluded, draft article 18 might include an additional provision, under which the depositary institution, even after notification, could discharge its obligation by paying the balance to its customer rather than to the assignee, unless the depositary institution, or its customer, has consented to payment to the assignee or such payment is ordered by court.

2. The Working Group may also wish to consider referring in subparagraph (b) to "instruments for the payment of money". Thus, all instruments transferred by endorsement or delivery would be excluded, irrespective of whether they are negotiable. In addition, the question of the exact meaning of the term "negotiable" would be overcome. On the other hand, such an approach may inadvertently result in an excessive limitation of the scope of the draft Convention. While an exclusion may be needed in order to ensure that the rights of a protected holder of a negotiable instrument would not be subjected to the rights of an assignee, it may not be necessary in the case of a transferee, who is not a protected holder and takes a non-negotiable instrument subject to adverse claims.

3. The Working Group may in addition wish to clarify whether only assignments from the old to the new owner of a business are excluded or also assignments by the new owner to an institution financing the sale of the business. While the present wording of subparagraph (c) appears as excluding both, there may be no reasons for excluding the financing of corporate acquisitions.

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CHAPTER II. GENERAL PROVISIONS

Remarks

Article 5. Definitions and rules of interpretation

1. A commentary to the draft Convention may usefully clarify that the exact meaning of contract conclusion referred to in subparagraph (b) is left to law applicable outside the draft Convention and that, in any case, this term does not include contract performance.

2. The Working Group may wish to consider deleting subparagraph (d). Even if it were possible to appropriately define "receivables financing", it may not be necessary for the purposes of defining the scope of application of the draft Convention, if a reference to the facilitation of receivables financing is included in the preamble to the draft Convention and assignments that are not of a financing nature are excluded from the scope of application of the draft Convention. In addition, such a definition may inadvertently result in excluding some practices that might develop in the future.

3. In order to accommodate the concerns expressed with regard to written form requirements for the assignment to be effective, the Working Group may wish to delete in subparagraph (e) the reference to authentication, i.e. signature, requirements. It is understood that, under such an approach, practices involving some type of writing, e.g., a list of receivables or a form with standard contract terms, would not be invalidated (such an approach, however, may not be consistent with modern trends in electronic commerce where only an authenticated electronic communication would qualify as a "writing"). Alternatively, rather than deviating from a written-form rule which has attracted the support of the overwhelming majority of the Working Group, the Working Group may wish to consider excluding certain practices from the written-form rule (e.g., transactions involving a prolonged reservation of title) or allowing those States that wish to preserve purely oral assignment practices to make a reservation as to the application of the form rule.

4. In subparagraph (f), a reference to draft article 16(3) should be added to the effect that a notification which does not meet the minimum requirements set forth in draft article 16(3) would not be effective under the draft Convention. If the Working Group reaches agreement on the minimum contents of notification, it would not be necessary to provide that a notification without the minimum content of draft article 16(3) may, e.g., cut off the debtor's rights of set-off becoming available after notification (see bracketed language in draft article 19(2)) or preclude the debtor from modifying the original contract without the consent of the assignee (see draft article 21(4)).

5. It should be noted that "priority", under subparagraph (i), is not intended to affect in itself the substantive rights of parties, which remain subject to their mutual agreements. This means that an assignee with priority does not obtain a right in the assigned receivables unless it has such a right under the assignment contract. The thrust of subparagraph (i) is thus that the assignee with priority is given a right of preference in the order of payment in case there are several claimants. Whether the assignee with priority may retain any surplus remaining after the satisfaction of its claim or has to turn over that surplus to the assignor or to the claimant who is next in the order of priority, depends on law applicable outside the draft Convention. If, under such law, an assignment is an outright assignment, a change in the substantive rights of the parties may inadvertently occur, since the assignee with priority will obtain the full value of the receivables and will not be obliged to account for or to return any balance remaining to the assignor or to the claimant who is next in the order of priority.

6. In view of the fact that in several jurisdictions a company may have several places of registration, the Working Group may wish to refer in subparagraph (j) to the place of incorporation or other organization. Even if such an approach were to be followed, a different rule may need to be devised in order to avoid subjecting the dealings of a branch office to the law of the country in which the head office is located. In addition, the Working Group may wish to consider the question whether such a location rule might be held unenforceable for public policy reasons (e.g., if the place

of incorporation has no relationship whatsoever to the assignment contract). Moreover, the Working Group may wish to consider the situation in which the assignor is located in a tax haven with no developed rules on assignment or priority issues (a problem that exists regardless of the location rule to be adopted in the draft Convention). A combined application of the private international law and the substantive law priority rules may address the problem, at least to some extent.

7. The Working Group may wish to delete subparagraph (k) in view of the fact that, at the previous session of the Working Group, it raised a number of concerns, including that, while it is intended to function as a default rule, it fails to cover the situation in which the parties had not specified the time of the assignment (see A/CN.9/447, para. 30).

* * *

Article 6. Party autonomy

The Working Group may wish to consider referring in paragraph (1) to draft articles 13(1), 14(2) and (3), 15, 16 and 17. While draft articles 10 and 11 recognize party autonomy as to the time as of which the receivables need to be identifiable and as to the time as of which the receivables are transferred, they are both subject to the rights of third parties and referring to them in paragraph (1) may have the unintended effect of allowing the assignor and the assignee to modify the rights of third parties. Alternatively, the Working Group may wish to consider adopting a more general formulation referring to the right of the parties to exclude or vary by agreement their respective rights and obligations, without affecting the rights of "third parties" (i.e., in the context of para. (1), the debtor and the third parties referred to in draft articles 23 and 24; and, in the context of para. (2), the assignee and the third parties referred to in draft articles 23 and 24).

* * *

Article 7. Debtor's protection

1. Under the draft Convention, the debtor's legal position may be affected in a number of ways including: an assignment in breach of a no-assignment clause will be valid (draft article 12); the way in which the debtor may discharge its obligation may change (draft article 18); the debtor may be unable to raise against the assignee certain defences or rights of set-off that it could raise against the assignor, e.g., those arising in the case of breach of a no-assignment clause (draft articles 12(2) and 19(3)); the debtor may be unable to waive certain defences (draft article 20); the debtor's right to modify the original contract after notification will be limited (draft article 21(2)); and the debtor will be unable to recover from the assignee payments made despite the fact that the assignor may have failed to earn the assigned receivables by performance or that the assignee may not have made the required payments to the assignor (draft article 22).

2. Paragraph (1) is intended to ensure that the assignment does not affect the rights and obligations of the debtor in any other way. The following example may be useful in demonstrating this approach. Under draft article 16(3), the assignee may specify in the notification the person to whom or the address to which payment is to be made. However, as a result of draft article 7(1), the assignee may not effect any other change in the terms of the original contract, unless otherwise provided in the original contract.

3. Paragraph (2) is aimed at ensuring that, irrespective of the changes to the legal position of the debtor that may result from the draft Convention, the country and currency of payment shall not be affected.

* * *

Article 8. Principles of interpretation

1. A commentary may usefully clarify whether certain issues that are not explicitly addressed in the draft Convention are left to other law applicable outside the draft Convention or they constitute gaps to be settled in conformity with the general principles on which the draft Convention is based and, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law (in either case, the rules contained in chapter VI would be helpful).

2. Issues not explicitly addressed in the draft Convention include: the meaning of an outright assignment and an assignment by way of security; possibly the question of the form of the contract of assignment (two of the three variants of draft article 9 refer the matter to the law applicable); the accessory or independent character of a security right, which is the basis for determining whether it is transferred automatically with the receivables the payment of which it secures, or whether a new act of transfer is needed; the consequences of a breach of representations by the assignor; to a large extent, the assignability of a receivable (the draft Convention covers it to some extent in that it specifies a number of receivables that are assignable, including future receivables and receivables not identified individually, and in that it deals with contractual limitations to assignment, but leaves other types of receivables and other statutory limitations to assignment unaddressed); the question whether the assignor is liable towards the debtor for assigning its receivables in violation of an anti-assignment clause; the question whether the right of the assignee to request payment is a right ad personam or in rem; the debtor's obligation to pay (the draft Convention deals with the debtor's discharge only); the discharge of the debtor on grounds other than those specified in the draft Convention (e.g., by paying the rightful claimant even in case the notification received does not meet the requirements of the draft Convention); the defences and rights of set-off that the debtor may raise against the assignee (the draft Convention provides that the debtor has against the assignee the same defences and rights of set-off that it would have against the assignor, without, however, specifying them); agreements between the debtor and the assignee by which the debtor waives its defences and rights of set-off towards the assignee; and questions of priority among several assignees of the same receivables, between the assignee and the insolvency administrator and between the assignee and the assignor's creditors (the basic priority rules of the draft Convention currently are private international law priority rules, although two alternative substantive law priority rules are offered to States to choose from, if they wish).

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CHAPTER III. FORM AND EFFECT OF ASSIGNMENT

Remarks

Article 9. Form of assignment

The Working Group may wish to consider stating in paragraph (1) first the rule (e.g., "An assignment has to be in writing") and then the legal consequences ("An assignment in a form other than in writing is not effective"). In addition, the Working Group may wish to consider an alternative formulation of variant A which would be dealing with evidence rather than effectiveness of the assignment (e.g., "An assignment needs to be evidenced by writing"), or a different formulation of variant B, e.g., "An assignment has to be in writing, unless the law of the State in which the assignor is located provides otherwise". Moreover, the Working Group may wish to consider deleting draft article 9 altogether or, at least, limiting its application to international assignments only. Assignors and assignees may not need the protection of a provision along the lines of draft article 9; debtors are protected, since they do not have to pay until they receive written notification of the assignment; and third parties are protected through fraud rules of the law applicable outside the draft Convention (for additional alternatives, see remark 2 to draft article 5(e) above).

* * *

Article 10. Effect of assignment

The reference in the opening words should be to draft articles 23 and 24. This reference is intended to ensure that the effectiveness of the assignment does not prejudice the rights of third parties. The debtor is not included in the parties referred to in draft articles 23 and 24. As a result, the assignment is effective as against the debtor as of the time it is made, i.e. even before notification. However, the debtor is protected, since, under draft article 18, it may refuse to pay the assignee before notification. The debtor may choose to discharge its obligation by paying the assignee. In such a case, however, the debtor takes upon itself the risk of having to pay twice if no assignment took place or it was ineffective. Thus, notification forms the basis for a defence of the debtor but is not made a condition of the effectiveness of the assignment.

* * *

Article 11. Time of transfer of receivables

1. As a result of draft article 11, an assignment transfers the receivables to which it relates at the time agreed upon between the assignor and the assignee or, in the absence of such an agreement, at the time of the assignment, subject to the rights of third parties other than the debtor. This also means that the assignment becomes effective as against the debtor even before notification.

2. Under the bracketed language contained in paragraph (1)(b), parties may not set a time of transfer that is earlier than the time of the assignment. As long as discretion of the parties does not affect the rights of third parties, there does not seem to be any reason why parties should be precluded from agreeing on any point of time for the transfer of the assigned receivables. The

Working Group may wish to modify draft article 11 in order to ensure that the parties have the discretion to set the time of transfer of the assigned receivables even with regard to receivables that exist at the time of the assignment.

* * *

Article 12. Contractual limitations to assignment

1. Under its current formulation, draft article 12 would cover contractual limitations contained in contracts, even if the debtor is a Government or a consumer, as well as contractual limitations contained in assignments or subsequent assignments or aimed at precluding competitors of a company from taking over or effectively controlling that company. The Working Group may wish to consider whether this all-encompassing approach is appropriate and, in particular: whether Governments would normally seek protection by way of contractual or statutory limitations to assignment (statutory limitations are not covered in draft article 12); and whether such anti-assignment clauses are likely to be included in normal consumer contracts in view of the relative small bargaining power of consumers.

2. Under paragraph (2), the assignee does not "get into the shoes of the assignor" but rather receives the receivables free of defences and rights of set-off of the debtor arising from a breach of contract by the assignor. While that result may be acceptable with regard to contractual liability, it may be objectionable with regard to liability based on tort principles, which may arise in case the assignee knew or ought to have known of the anti-assignment clause. On the other hand, if the assignee is exposed to tort liability, paragraph (2) may be meaningless, since the assignee would not have contractual liability anyway. In any case, paragraph (2) does not protect the assignee in the case where the debtor terminates the original contract as a result of the breach of the anti-assignment clause by the assignor.

* * *

Article 13. Transfer of security rights

1. The reference contained in paragraph (1) to other law (i.e. the law governing the receivable) or agreement of the parties is intended to avoid referring to accessory security rights that may not be universally understood in the same way. The term "law" is intended to cover both statutory and case law.

2. The thrust of paragraph (2) is that security rights are to be treated in the same way as receivables and thus their transfer despite a contractual limitation should be effective. Paragraph (3) is intended to ensure that the principles embodied in paragraphs (1) and (2) apply to possessory security rights as well, as long they do not prejudice the rights of the debtor or the person granting the property right. Should the Working Group change its position with regard to draft article 12(2), it may need to reconsider paragraph (3) with a view to preserving any liability of the assignee towards the debtor for the transfer of a security right in violation of a contractual limitation (at least in case the assignee knew or to ought to have known about the anti-assignment clause).

* * *

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Remarks

Comments to draft articles 14 to 22 refer to those provisions as they were adopted by the Working Group at its previous session and reproduced in the annex to the report of that session (A/CN.9/447).

Article 14. Rights and obligations of the assignor and the assignee

1. Under draft article 14, party autonomy prevails with regard to the relationship between the assignor and the assignee, since, with the exception of the provision dealing with written form requirements, there is no provision in the draft Convention dealing with the rights and obligations of the assignor and the assignee in a mandatory way. Draft article 14 makes also reference to trade usages to which the assignor and the assignee have agreed, practices established between themselves, unless otherwise agreed, and widely known and generally observed international usages.

2. Paragraphs (2) and (3) originate from article 9 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; hereinafter called "the Sales Convention"). While paragraph (2) is identical with paragraph (1) of article 9 of the Sales Convention, paragraph (3) is slightly different in that it is limited to international assignments only and does not include the requirement of actual or constructive knowledge for an international usage to become applicable to the assignment. Thus, a domestic assignment of international receivables will not be subjected to international usages and third parties would not need to establish what the parties to the assignment knew or ought to have known.

* * *

Article 15. Representations of the assignor

1. Representations normally form an essential part of the contract of assignment, and draft article 15 is intended, on the one hand, to give legislative strength to party autonomy in that regard and, on the other hand, to function as a default rule allocating the legal and credit risk as between the assignor and the assignee in case they have not done so in their contract.

2. Under paragraph (1)(a), the assignor represents that it is the owner of the receivable being assigned and has the right to assign it. As a result of draft article 12, which validates an assignment made despite an anti-assignment clause contained in the original contract, it is understood that the assignor has the right to assign even if the original contract contains an anti-assignment clause. As to statutory limitations to the assignability of a receivable, paragraph (1)(a) places the risk on the assignor, since the assignor is in a better position to find out whether such a limitation exists.

3. Paragraph (1)(b) is intended to ensure that the assignee will have a cause of action against the assignor in case subsequent to the assignment it turns out that the assignor has already assigned the

receivables (the issue of whether the assignee can turn against another assignee who received payment is a distinct issue dealt with in the context of the provisions addressing priority issues). Such a representation is normally included in outright assignments and refers to previous outright assignments. In assignments by way of security, however, it is normal practice to assign receivables several times while assignees are given different priority rights. Thus, in such assignments such a representation may not be appropriate.

4. Under paragraph (1)(c), in the absence of an agreement to the contrary, the assignor represents that the debtor will not have against the assignor any defences or rights of set-off based on the original contract or other, unrelated, contracts, which the debtor could raise, under draft article 19, against the assignee. The approach taken in the paragraph is justified on the assumption that the assignor is in a better position to know whether its contractual partner, the debtor, will have defences or rights of set-off as a result of the non-performance or faulty or late performance of the original contract by the assignor. Such an approach may also be justified on the grounds that such a representation on the part of the assignor, which will reduce the risk of the transaction for the assignee, is likely to reduce the cost of credit.

5. Paragraph (2) adopts an approach generally followed in legal systems, namely that the credit risk of the debtor's payment default is on the assignee, unless the assignor agrees otherwise.

* * *

Article 16. Notification of the debtor

1. With a view to preserving non-notification practices, paragraph (1) establishes a right, not an obligation, to notify the debtor. Paragraph (1) also accommodates those situations in which notification is given to the debtor along with an instruction to continue to pay the assignor, which is of importance to practices, such as securitization, in which the assignee does not have the necessary structure to receive payment or do bookkeeping.

2. As a result of the combined application of paragraphs (1) and (2), the assignor and the assignee may agree not to notify the debtor, but that does not preclude the assignee from notifying the debtor and requesting payment, even though the assignee may be liable to compensate the assignor for any damages it may have suffered as a result of the assignee's breach of the non-notification agreement.

3. Another important feature of paragraphs (1) through (3) is that no distinction is made between notification and request for payment. This approach largely reflects current good practice which is aimed at ensuring certainty as to how payment is to be made. Such certainty benefits the assignee, who is interested in payment being made by the debtor in accordance with the assignee's instructions. It also benefits the debtor, who needs to be clear as to how to discharge its obligation. Even in cases in which payment is to continue to be made to the assignor, the notification normally includes such an instruction to the debtor.

4. The need for certainty for both the assignee and the debtor is the main justification for the content of the notification as specified in paragraph (3), i.e that the notification has to contain a reference to the fact of the assignment, the assigned receivables and the identity of the assignee and the payee.

5. Notification has important consequences under the draft Convention. It triggers a change in the way in which the debtor may discharge its obligation (draft article 18(2)); it affects the rights of set-off that the debtor may raise against the assignee (draft article 19(2)); and it limits the ability of the debtor to revise the original contract without the consent of the assignee (draft article 21(4)).

6. If the Working Group confirms the position taken so far as to the content of the notification, the wording of draft articles 18(2) and (3) should be aligned with draft article 16(3). Other than draft article 16(3), which refers generally to the address (i.e. the bank account, post office box or other address to which payment is to be made), draft articles 18(2) and (3) require identification of the bank account in the notification.

7. In addition, if the Working Group confirms its position with regard to draft article 16(3), it may wish to address in the context of draft article 18 a question which is currently not addressed therein, namely the question whether the assignee or the person giving notification may send a second notification correcting an error or changing the payment instructions contained in the first notification (see remark 6 to draft article 18 below).

8. Moreover, the Working Group may wish to consider the question whether a notification which does not meet the minimum requirements set forth in draft article 16(3) should nevertheless cut off the debtor's rights of set-off becoming available after notification or limit the debtor's ability to revise the original contract after notification without the assignee's consent (see remarks to draft articles 19(2) and 20(4) below).

9. Paragraph (4) is aimed at ensuring that the notification is designed to be understood by the debtor. In view of the important consequences of notification under the draft Convention, paragraph (4) establishes certainty by way of a "safe harbour" rule, i.e., a rule under which notification in a language specified in the original contract would be effective. In addition, paragraph (4) recognizes by implication the effectiveness of multilingual notifications.

10. The Working Group might wish to consider the location of draft article 16 in the draft Convention. Presently, draft article 16 is placed in section I of chapter IV, since notification is a right of the assignor and the assignee. However, at the same time, notification affects the rights of the debtor, a matter which is dealt with in section II of chapter IV.

* * *

Article 17. Right of the assignee to payment

(1) Subject to articles 23 and 24, unless otherwise agreed between the assignor and the assignee:

(a) the assignee is entitled to claim payment of the assigned receivable from the debtor and, if payment with respect to the assigned receivable is made to the assignee, to retain whatever is received in total or partial discharge of the assigned receivable ("proceeds");

(b) if payment with respect to the assigned receivable is made to the assignor, the assignee is entitled to claim payment from the assignor and to retain any proceeds.

(2) If payment with respect to the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to any proceeds.

(3) The assignee may not retain an amount in excess of its right in the receivable.

References: A/CN.9/WG.II/WP.96, article 17
A/CN.9/447, paras. 48-62

Remarks

1. Draft article 17 is intended to ensure that the assignee has effective rights in whatever is received in discharge of the assigned receivable. The opening words of paragraph (1) are intended to ensure that the right of the assignee to claim and retain payment is without prejudice to the rights of third parties, such as other assignees obtaining the same receivables from the same assignor, the assignor's creditors and the administrator in the insolvency of the assignor. They are identical with the opening words of draft articles 10 and 11; and like the opening words in those draft articles, they are premised on the assumption that the assignee may claim payment from the debtor even before notification, while the debtor, under draft article 18, has a right to refuse payment on the grounds that it received no notification.

2. Paragraph (1) is a default rule applicable only if the assignor and the assignee have not otherwise settled the matter of payment in their contract. Subparagraph (a) establishes the assignee's right to claim payment from the debtor and to retain such payment once made. Subparagraph (b) entitles the assignee to claim payment from the assignor, if payment is made to the assignor, and to retain such payment. The reference to discharge of the assigned receivable is intended to cover situations in which payment is made in kind, which is the case, e.g., where the assignee claims the goods sold to the assignor or retains goods returned by the debtor.

3. Paragraph (3) establishes the right of the assignee to claim payment with respect to the assigned receivable from other persons, to whom such payment has been made, provided that the assignee has priority over those persons. While the assignee may claim payment of the full amount of the assigned receivable, it may not retain an amount in excess of its right in the assigned receivable (e.g., in case of a loan secured through a receivable of higher value, in excess of the amount of the loan plus the interest or other costs owed).

4. The Working Group may wish to consider whether proceeds of proceeds should also be covered, in which case the definition of proceeds would need to be revised. Such proceeds of proceeds may be described as "different generations" of proceeds (e.g., payment is made in kind, thus the goods are first generation proceeds of the receivables; then, the goods are sold and the cheque received constitutes second generation of proceeds; thereafter, the cheque is cashed in and the cash constitutes third generation proceeds).

5. It should be noted that the draft Convention on International Interests in Mobile Equipment currently being prepared by the International Institute for the Unification of Private Law (hereinafter referred to as "the UNIDROIT draft Convention") does not cover proceeds of mobile equipment, since it is considered that such an approach would lead to the application of the UNIDROIT draft

Convention to types of assets (e.g., receivables) that are quite different from the assets for which it was designed. It is arguable, however, whether the issue of proceeds is as important in the UNIDROIT draft Convention as in the draft Convention. In the typical transaction covered by the UNIDROIT draft Convention mobile equipment may not be sold without the consent of the secured party, while in the draft Convention receivables will be reduced to cash on a regular basis.

* * *

Article 17bis. Competing rights with respect to proceeds

(1) Variant A

In case of competing rights referred to in articles 23 and 24:

(a) if the proceeds take the form of receivables, priority with respect to proceeds is governed by the law of the State in which the assignor is located;

(b) if the proceeds take the form of other assets, priority with respect to proceeds is governed by the law of the State in which they are located.

Variant B

Priority with respect to cash proceeds is governed by the law of the State in which the assignor is located. For the purposes of this article, "cash proceeds" means money, cheques[, balances in deposit accounts and similar assets].

(2) Paragraphs (3) to (5) of article 24 apply to a conflict of priority arising between an assignee and the insolvency administrator or the assignor's creditors with respect to proceeds.

References: A/CN.9/447, paras. 63-68
A/CN.9/445, paras. 215-220

Remarks

1. While the Working Group has agreed that the assignee should be given effective rights to whatever is received in discharge of the receivable, it has been unable to reach agreement on the question whether the assignee's right should be a personal (ad personam) or a proprietary (in rem) right (A/CN.9/445, para. 218 and A/CN.9/447, paras. 63-68). This question becomes an important one, in particular in case payment is made to the assignor and the assignor becomes insolvent. Treating the assignee's right in the proceeds of receivables as a right in rem would reduce the risk of non-payment for the assignee, since in the case of insolvency of the assignor the assignee could take the receivables out of the insolvency estate (in the case of an outright assignment) or, at least, be treated as a secured creditor (in the case of an assignment by way of security). Such an approach would have the potential of decreasing the cost of credit. However, in many jurisdictions the assignee's right in the proceeds of receivables is cast as a right ad personam. Thus, attempting to

follow another approach would run counter to national law involving public policy considerations and could jeopardize the acceptability of the draft Convention to many States.

2. With a view to facilitating the Working Group's consideration of this matter, priority with respect to proceeds is dealt with provisionally in draft article 17bis. If the Working Group decides to retain this article, it may wish to consider moving it right after draft article 24 dealing with priority with respect to receivables.

3. Variant A is based on the assumption that a single private international law rule dealing with all types of proceeds would not be acceptable. While the assignor's location would provide a single and easily determinable point of reference, it appears that it would be objectionable to subject the rights of, e.g., a holder of a negotiable instrument or the beneficiary of a funds transfer or the person in possession of goods received in discharge of the assigned receivable to the law of the country in which the assignor is located (the same objection could be raised with regard to the law of the assignee's location).

4. On the other hand, referring priority issues with respect to proceeds to the law of the country in which the proceeds are located would ensure that mandatory rules of law dealing, e.g., with rights in negotiable instruments or goods would prevail. However, it would, at the same time, result in subjecting to different laws different stages of the same transaction (i.e., payment in cash, then in the form of a negotiable instrument, then in the form of a funds transfer) or different forms of the same assets (i.e., receivables and different types of proceeds). In addition, such an approach could inadvertently result in assignees structuring transactions in an artificial way in order to subject them to the law of a convenient jurisdiction ("forum shopping").

5. Subparagraph (a) of variant A is consistent with the approach followed in the context of priority with regard to receivables. Such an approach would result in the law governing priority being the law of the jurisdiction in which insolvency proceedings with regard to the assignor are most likely to be opened (i.e., the law of the country in which the assignor is located). Variant B, which is aimed at preserving mandatory rules relating, e.g., to negotiable instruments or funds transfers, constitutes an attempt to come up with a single rule dealing with the most usual types of proceeds, namely cash proceeds. Should the Working Group prefer to take this approach, it may need to: align the definition of "cash proceeds" contained in draft article 17bis with the definition of "proceeds" contained in draft article 17; and to consider the question of "the location" of an asset. "Balances in deposit account and similar assets" appear within square brackets, since it may not be appropriate to subject conflicts of priority between financing institutions and assignees to the law of the assignor's location, or to include in the definition a general reference to "similar assets", which may introduce uncertainty or even produce undesirable results.

6. It should be noted that, irrespective of the approach to be taken with regard to the law applicable to issues of priority in proceeds, the matter would remain unaddressed if the law applicable did not deal with it. However, the inclusion of a substantive law rule in the draft Convention, which would apply only in case the applicable law did not deal with the matter or which could be opted into by Contracting States, could inadvertently result in fragmentation of the law applicable and thus in increased uncertainty (the same argument may be made with regard to chapter VII, see remark 4 to chapter VII below).

7. The Working Group may wish to consider whether draft article 17bis should be retained at all. If proceeds of receivables are in the form of receivables, they would be covered by draft articles 23 and 24 anyway. If such proceeds take the form of another asset, it may not be realistic to try to address priority issues even by way of a private international law rule.

8. The question whether priority issues should be addressed in case the receivables are themselves proceeds of another asset (e.g., a conflict between an inventory financier and an assignee) is a different question. The Working Group may wish to consider whether, if an inventory financier's rights extend under the applicable law to the receivables received from the sale of the inventory, the inventory financier is to be considered as an assignee under the draft Convention, in which case such conflicts would be covered by the draft Convention. If there is agreement in the Working Group on such an approach, this point may be clarified in the text or in a commentary to the draft Convention.

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Section II. Debtor

Remarks

Article 18. Debtor's discharge by payment

1. Draft article 18 is intended to address the question of the debtor's discharge by providing the debtor with a right to refuse to make payment before notification. The debtor may choose to pay the assignee even before notification, but in such a case, it takes the risk of having to pay twice if it is later proven that no assignment or no valid assignment took place. Thus, notification is structured as the basis for a defence of the debtor and not as a condition for the effectiveness of the assignment, which would unnecessarily formalize the assignment.

2. Draft article 18 is not intended to deal with the debtor's payment obligation. Neither draft article 18 nor any other article in the draft Convention establishes an obligation of the debtor to pay. This approach is based on the assumption that such an obligation remains subject to the original contract and to the law applicable to that contract, which is not the subject of this draft Convention In addition, draft article 18 is not intended to deal with the right of the assignee to claim payment from the debtor, even before notification. This right is established in a number of draft articles, including draft articles 10, 11 and 17.

3. The basic rule about the debtor's discharge is set forth in paragraphs (1) and (2). Before notification, the debtor "is entitled" to discharge its obligation by paying the assignor (as mentioned above, the debtor may decide to pay the assignee). After notification, the debtor "is discharged only" by paying the assignee.

4. Paragraphs (3) through (5) deal with exceptional cases, i.e. multiple notifications about several assignments of the same receivables by the same assignor, notification by the assignee, and discharge of the debtor under the law applicable outside the draft Convention through payment to the person entitled to it.

5. In case of multiple notifications, the draft Convention provides the debtor with a simple discharge rule, namely "pay the person identified in the first notification and be discharged" (draft article 18(3)). Whether the person who received payment will be able to retain it is a matter to be settled on the basis of the priority rules of the draft Convention. This approach is based on the assumption that assignees cannot afford uncertainty as to payment and would identify the person to whom or the address to which payment is to be made in any notification, whether payment is requested to be made to the assignor, the assignee or a third person. At the same time, debtors should not be placed in a position of having to seek legal advice in order to interpret the meaning of a notification, e.g., whether it is a bare notification or a request for payment.

6. However, draft article 18(3) does not adequately cover a different situation in which multiple notifications may be given about one and the same assignment. Such notifications may constitute a correction of an error or a change in the instructions contained in previous notifications. The assignee, who is the only rightful owner of the receivables after notification, irrespective of whether payment is to be made to the assignee, the assignor or a third person, and who is identified in the notification, under draft article 16(3), should be able to make corrections or change the instructions contained in previous notifications. Thus, the Working Group may wish to consider adding to draft article 18 a provision along the following lines: "If the debtor receives more than one notification relating to the same assignment, the debtor is discharged by paying the person or to the address identified in the last notification before payment".

7. In the exceptional case in which the debtor may receive several notifications, some relating to more than one assignment of the same receivables by the same assignor and some relating to one and the same assignment, under a combined application of draft article 18(3) and the suggested new paragraph, the debtor would have to identify the first notification (in case of corrections or changes, the date of the first notification should probably be taken into account, provided that that notification meets the requirements of draft article 16(3)) and pay the person or to the address identified in the first notification, unless that notification had been later modified, in which case the debtor would have to pay the person identified in the last notification. From the above analysis, it becomes clear that an approach more favourable to the debtor, which would make it easier for the debtor to know how to discharge its obligation in case it receives several notifications of more than one assignment, would be to allow the debtor to discharge by paying the person or to the address identified in any of the several notifications, and leave it to the assignees or other claimants to fight among themselves for the proceeds of payment. However, such an approach might inappropriately result in harming the interests of the rightful claimant and may be an unnecessary protection, at least, in the case of corporate debtors, who should be able to sort out the rightful claimant if they receive several notifications.

8. Under paragraph (4), the debtor has the right to request the assignee serving notification to provide the debtor within a reasonable period of time with additional proof about the assignment. Such proof could take the form of a writing emanating from the assignor. As a result, the payment obligation is suspended and the debtor is not obliged to pay the amount owed or interest thereon. Theoretically, the debtor may choose to pay, during that reasonable period of time, the assignor or the assignee, but such payment would be made at the debtor's own risk. What would be a reasonable period of time is a matter of interpretation in view of the relevant circumstances. In order to avoid the resulting uncertainty, the Working Group may wish to set a certain time-limit that

could not be exceeded in any case. It should be noted, however, that any time-limit may be arbitrary.

9. The thrust of paragraph (5) is that draft article 18 should not exclude any other grounds for discharge of the debtor that may exist under the law applicable outside the draft Convention, whether contractual or non-contractual. This approach is premised on the assumption that, as long as the desirable economic result is achieved (i.e. payment is made to the person entitled to payment, a judicial or other authority or a public deposit fund) and, e.g., despite the lack of a notification in accordance with the draft Convention, there is no reason to deny the debtor a valid discharge.

* * *

Article 19. Defences and rights of set-off of the debtor

1. The thrust of draft article 19 is that the debtor may raise against the assignee, at any time, any defences or rights of set-off, arising under the original contract, that it could raise against the assignor. After notification, the debtor could raise only rights of set-off arising under separate dealings between the assignor and the debtor, only if they were available to the debtor at the time it received notification of the assignment. The rationale under this approach is that a diligent assignee, who notified the debtor, should not be exposed to the risks arising from dealings between the assignor and the debtor that are unrelated to the original contract.

2. While draft article 19 provides that the debtor may raise against the assignee the defences and rights of set-off that it may have against the assignor, it is not intended to specify the types of defences or rights of set-off of the debtor. This matter remains subject to the contract(s) between the assignor and the debtor and to the law applicable thereto, which the draft Convention does not attempt to cover.

3. The exact meaning of the term "available", i.e. the question whether it means that the counterclaim has to be "actual and ascertained" or, at least, quantified at the time of the notification, is left to the law applicable outside the draft Convention.

4. The Working Group may wish to address the question whether in those exceptional cases in which the notification did not identify the person to whom or the address to which payment should be made, the notification should nevertheless have the effect of cutting off the debtor's rights of set-off arising after notification (see bracketed language in draft article 19(2), reproduced in the annex to document A/CN.9/447).

5. Paragraph (3) is intended to introduce an exception to the rule embodied in paragraphs (1) and (2) and to ensure that the debtor could not raise against the assignee the defences or rights of set-off that it could raise against the assignor (see remarks to draft article 12).

* * *

Article 20. Agreement not to raise defences or rights of set-off

1. Waivers of defences included in contracts have a tendency of increasing the access to lower-cost credit, since they are likely to reduce the risk of non-payment for assignees. In recognition of this economic reality, draft article 20 establishes party autonomy with regard to waiver of defences agreed between the assignor and the debtor.

2. There are two exceptions to the above-mentioned rule. Waivers may not be allowed under consumer-protection legislation and may not relate to certain defences which the debtor could raise if the receivables were embodied in a negotiable instrument, such as defences arising from fraudulent acts on the part of the assignee alone or in collusion with the assignor. It is assumed that defences arising from fraudulent acts of the assignor alone may be waived, since otherwise an assignee who had acted in good faith, would be required to investigate whether the original contract has been vitiated by fraud on the part of the assignor. It is understood that waivers of defences agreed between the assignee and the debtor are not covered in draft article 20. Thus, the question whether they are allowed is left to other applicable law and they are not subject to the exceptions set forth in paragraph (2).

3. In line with the requirement for the waiver to be in writing, a requirement which is intended to protect the debtor, paragraph (3) requires a writing for modifications of any waiver. At the same time, in order to protect the assignee, paragraph (3) limits the cases in which such a modification may be effective as against the assignee without the consent of the assignee.

* * *

Article 21. Modification of the original contract

1. Draft article 21 is intended to address those cases in which the original contract needs to be modified in order to be adjusted to changing needs (e.g., in construction contracts) or circumstances (e.g., an event rendering the debtor unable to perform). Thus, draft article 21 is a debtor-protection rule. At the same time, however, it is a rule aimed at ensuring that the assignee will acquire, as against the debtor, rights under the modified contract that correspond to the assigned receivable. The assignee's rights as against the assignor arising under their agreement remain unaffected by this provision (see paragraph (3)).

2. Under paragraph (1), before notification of the assignment, a modification of the original contract is effective as against the assignee in the sense that, e.g., the assignee may not claim the original amount of the receivable. In addition, the assignee acquires "corresponding rights" in the sense that it is entitled, e.g., to claim from the debtor the modified amount, while its right to claim the original amount from the assignor remains unaffected.

3. Paragraph (2) provides that, after notification, a modification of the original contract is not binding on the assignee, unless the assignee consents to it or, in the case of a partially earned receivable, modification is foreseen in the original contract or a reasonable assignee would consent to the modification. In the case of a fully earned receivable (i.e. a receivable in respect of which an invoice has been issued, even if the relevant contract has only partially been performed), the consent of the assignee is always required for a modification to bind the assignee. Such an approach is

aimed at setting forth a rule that would be characterized both by certainty (no modification without the consent of the assignee) and flexibility in order to address special circumstances in which requiring the specific consent of the assignee would not be practical or desirable (e.g., minor modifications to construction contracts).

4. Paragraph (3) is aimed at ensuring that a modification in the original contract does not affect the rights of the assignee under the assignment contract. Paragraph (4) raises the question whether a notification which does not meet the requirements of draft article 16(3) should nevertheless trigger a change in the way in which a modification of the original contract would bind the assignee.

* * *

Article 22. Recovery of advances

This is the second provision of the draft Convention in which general reference is made to consumer-protection legislation (the other is draft article 20). In principle, references to mandatory rules or rules reflecting public policy should be made only in exceptional cases, in which it is not possible to reach agreement on a rule that would address such concerns. Otherwise, the goal of certainty and facilitation of access to lower-cost credit could not be achieved. In effect, a general reference to mandatory rules or rules reflecting public policy could undermine the certainty sought and inadvertently defeat the goal of the draft Convention to facilitate access to lower-cost credit, since it would be impossible to predict whether the draft Convention would apply or be set aside by a judge on the basis of not widely known or possibly extreme notions of mandatory or public policy law.

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Section III. Third parties

Article 23. Competing rights of several assignees

1. While it is understood that a private international law rule dealing with priority issues could not lead to full uniformity, it could facilitate the extension of credit at more affordable rates. With the uncertainty currently prevailing as to the law applicable to questions of priority, assignees have to meet the requirements of a number of jurisdictions in order to ensure that they would obtain priority, a process which increases the cost of credit. A clear private international law provision could have a positive impact on the cost and the availability of credit, to the extent that it would allow assignees to know which law applies to questions of priority and to ensure their rights by meeting the requirements of the applicable law. In addition, a private international law rule would have the advantage of overcoming the problem of having to resolve conflicts between Convention and non-Convention assignees, since the matter would be left to the applicable law. Moreover, a private international law rule might make the draft Convention more acceptable to States, at least, to the extent that national laws governing priority would be preserved (as to the possibility of conflicts arising between the draft Convention and the Convention on the Law Applicable to Contractual Obligations, Rome, 1980, hereinafter referred to as the "Rome Convention", see remarks to draft article 42).

2. Draft article 23, combined with draft article 5(j) (which is intended to refer to a single and easily determinable place), could provide the level of certainty sought by financiers, thus allowing for low-cost financing on the basis of receivables assigned in bulk. In the context of bulk assignments, subjecting questions of priority to the law governing the receivable could have an adverse impact on the cost and the availability of credit, since assignees would either not be able to determine at the time of the assignment the law applicable to the assignment (to the extent that future receivables would be included), or would need to examine each contract from which the receivable arose to determine the applicable law. Similarly, referring to the law chosen by the parties to the assignment and, in the absence of a choice of law by the parties, to the law with the closest relationship with the assignment contract would be impractical, since competing assignees may have chosen different laws in their assignment contracts and different assignments may be closely related to the law of different countries. In addition, it would not seem to be appropriate to subject the property effects of the assignment to the law chosen by the parties.

3. In line with the approach taken in draft article 31, the Working Group may wish to consider including in draft articles 23 and 24 a reference to the time of the assignment as the point of time which should be taken into account in order to determine the law applicable to priority questions. In addition, in draft article 23, which deals with duplicate assignments, the question would also need to be settled as to which law governs in case the assignor moves to a new location after the assignment, the law of the location of the assignor at the time of the first or of a subsequent assignment. The assignee with priority under the law of the initial location of the assignor should not lose its priority position just because the assignor relocated. On the other hand, the rights of assignees in the new location should not be for ever subject to the rights of assignees from other jurisdictions. In order to achieve this result, language along the following lines may be added in draft article 23:

> "Where the assignor changes its location after the assignment, the assignee with priority under the law of the State in which the assignor was initially located retains its priority:
>
> "(a) for a period of [six months]; or
>
> "(b) until priority would have ceased under the law of the State in which the assignor was initially located; or
>
> "(c) by meeting the requirements for obtaining priority under the law of the State of the new location of the assignor before priority ceases under subparagraph (a) or (b) of this article; or
>
> "(d) if it happens to have priority under the law of the State of the new location of the assignor."

4. It should be noted that, in case the assignor moves from a registration to a time-of-assignment jurisdiction, under the proposed rule the assignee would not be able to retain its priority. However, the magnitude of this problem should not be over-estimated, at least with regard to corporate assignors. If location is defined as place of incorporation, the problem with a relocation would occur only in exceptional situations, in which the assignee would need to take other measures to protect itself, including enforcing contractual clauses that might deal with relocation of the assignor

or resorting to other remedies in case of fraud.

* * *

Article 24. Competing rights of assignee and insolvency administrator or creditors of the assignor

The Working Group may wish to consider the question whether draft article 24 should refer to "the effectiveness" of the assignment as against third parties rather than to "priority". The Working Group may also wish to consider the question whether the rule of paragraph (4) should be expanded to preserve the rights of judgement creditors existing under mandatory rules of law.

* * *

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Remarks

Article 25. Scope

1. While it may be desirable to cover subsequent assignments that fall within the scope of the draft Convention, even if the initial assignment falls outside the scope of the draft Convention (e.g., a subsequent assignment in a securitization transaction may be covered even if the initial assignment was a domestic assignment of domestic receivables), subparagraph (a) appears to be inconsistent with the principle of continuatio juris embodied in subparagraph (b). In addition, combined with draft article 27, subparagraph (a) may lead to the unintended result that the debtor paying in accordance with draft article 27 may not be discharged under the law applicable to the initial assignment.

2. Subparagraph (b) is intended to reflect the principle of continuatio juris, i.e. that the regime governing the initial assignment should govern any subsequent assignment. In the absence of such a rule, in a chain of assignments parties would not be able to have any certainty as to their rights, since each assignment could be subject to a different legal regime. Subparagraph (b) could operate well if the initial receivable is international, since any subsequent assignee would be able to predict that the draft Convention would apply to subsequent assignments by virtue of the internationality of the receivable. However, where the initial receivable is domestic, the application of subparagraph (b) might not produce satisfactory results, since a subsequent assignee would not be able to predict the application of the draft Convention to a domestic assignment of a domestic receivable. In order to avoid a situation in which the draft Convention would apply to domestic assignments of domestic receivables, language along the following lines should be added at the end of subparagraph (b): "provided that, if the receivable is a domestic one, a subsequent assignment with the assignor and the assignee being located in the same State as the debtor is not governed by this Convention".

* * *

Article 26. Agreements limiting subsequent assignments

Draft article 26 is intended to address situations in which anti-assignment clauses, included in the original contract, or the initial or any subsequent assignment, prohibit any subsequent assignments. It introduces the same rule as the rule contained in draft article 12, namely that the assignment is effective and that, if any assignee is liable towards the debtor or any assignor under other applicable law outside the draft Convention for further assigning the receivable despite an anti-assignment clause contained in the original contract, in the assignment or in any subsequent assignment, that liability is not extended to any subsequent assignee (see remarks to draft article 12).

* * *

Article 27. Debtor's discharge by payment

In case the debtor receives several notifications relating to a number of subsequent assignments, the debtor should be able to discharge its obligation by paying the person or to the address identified in the last notification received before payment. Thus, for the debtor to be able to determine that that rule would apply and not the rule of draft article 18(3) (which provides that the debtor should discharge its obligation by paying the person or to the address identified in the first notification), the notification should indicate the fact that several subsequent assignments had taken place. However, in practice, no problem may arise since normally only the last assignee would need to notify the debtor and thus the first notification would be also the last.

* * *

Article 28. Notification of the debtor

The content of notification in the context of subsequent assignments may need to be different, since the debtor receiving a notification would need to be able to determine whether a series of subsequent assignments or of several assignments of the same receivables by the same assignor are involved.

* * *

CHAPTER VI. CONFLICT OF LAWS

Remarks

Chapter VI became the subject of a discussion at a special meeting of experts organized by the Hague Conference on Private International Law in cooperation with the UNCITRAL Secretariat. It is expected that a report of that meeting will be prepared by the Permanent Bureau of the Hague Conference and submitted to the Working Group for consideration. The Working Group may wish to consider chapter VI in the light of that report. In addition, the Working Group may wish to consider whether certain terms, e.g., location of the assignor, might need to be defined differently for the purpose of chapter VI.

Article 29. Law applicable to the contract of assignment

The Working Group may wish to consider the question whether draft article 29 should be retained or deleted. In favour of deletion, it may be argued that the contract of assignment is no different from any other contract and thus it would not be appropriate to address in the draft Convention the question of the law applicable to the assignment contract. In favour of retention, it may be argued that the assignment contract is different from other contracts in that it has, in addition to contractual, proprietary effects. This difference raises the question whether the same law should apply to both the contractual and the proprietary effects of the assignment contract. Draft article 29 is intended to subject both the contractual and the proprietary effects of the assignment as between the parties thereto to the same law. The Working Group may wish to consider the question whether this approach is appropriate. In addition, thee Working Group may wish to consider the question whether the current wording of draft article 29 is sufficient to achieve the result intended.

* * *

Article 30. Law applicable to the rights and obligations of the assignee and the debtor

One of the questions that the Working Group may wish to address in the context of its discussion of draft article 30 is the exact meaning of the term "assignability". "Assignability" could refer to contractual assignability (i.e., whether there is an anti-assignment clause in the contract under which the assigned receivables arise), to statutory assignability (e.g., prohibition by law of the assignment of wages or pension benefits) or to both. It may be argued that draft article 30, which deals with the debtor's rights and obligations as against the assignee, should cover only contractual assignability, which is aimed at the debtor's protection, and not statutory assignability, which is aimed at the assignor's protection. In paragraph (3), the Working Group may consider adding a reference to the law chosen by the assignor and the debtor, in order to accommodate the reasonable expectations of the debtor and to enable assignees to rely on choice of law clauses contained in the contracts under which the assigned receivables arise.

* * *

CHAPTER VII. ALTERNATIVE PRIORITY RULES

Remarks

1. Under the current formulation of the scope provisions of the draft Convention (i.e. draft articles 1-4), sections I (priority rules based on registration) and II (registration rules) of chapter VII would not be fully acceptable even to States following a registration approach. In such States, not all transactions presently falling within the scope of application of the draft Convention are subject to registration for priority purposes. In addition, certain provisions of section II would be objectionable in some of those States (e.g., draft article 37(3) providing that registration is effective once the data registered become available to searchers).

2. Thus the Working Group may wish to consider limiting the scope of the draft Convention and expanding sections I and II, bringing them in line with the law applicable in countries following a

registration system. Alternatively, the Working Group may wish to consider substantially reducing, or even deleting, chapter VII.

3. An expansion of sections I and II would potentially make it possible for countries already following or interested in introducing a registration system to opt into sections I and II or to section II alone (see remark to draft article 43). Under such an approach, sections I and II could be used in one of the three following ways: States may apply their own domestic law based on registration, but use the international registration system (either registering directly at the international registry or registering locally, as long as the data are available through the international registry; in such a case the draft Convention would address the need for one registration system or one data bank but not the need for uniform priority rules); States may apply the registration-based priority rules of the draft Convention and use the international registration system, but only for the transactions falling within the scope of the draft Convention (in such a case, conflicts between Convention and non-Convention assignees may be left outside the scope of the draft Convention); or States might apply the priority rules applicable under draft articles 23 and 24 for all transactions, domestic and international.

4. However, such an expansion of sections I and II might create a number of difficulties, including that: the draft Convention could inadvertently result in fragmentation of the law, in particular if each State were given the discretion to apply sections I and II in different ways as described above; the draft Convention would become very lengthy and its application would be significantly complicated; section III would probably need to be expanded and a third alternative priority rule based on notification would need to be added; and such an endeavour could be very time-consuming.

5. On the other hand, reduction of chapter VII to a few general principles would considerably simplify the draft Convention and make it more acceptable to States and easier to apply. In addition, under such an approach the draft Convention would recognize registration in principle, allowing States interested in registration to set up such a system, at the national or international level. Moreover, the draft Convention would be compatible with such laws following a registration-based approach. As to the preparation of model legislative provisions on security rights in receivables and possibly other assets aimed at providing guidance to States without detailed legislative rules in this field, this endeavour should be viewed as a significant separate project, which could be considered at a future point of time, probably in cooperation with other organizations active in this field of law.

* * *

CHAPTER VIII. FINAL PROVISIONS

Remarks

Article 42. Conflicts with international agreements

1. Under draft article 42, it is left to each State to determine whether to give precedence to this Convention or to another Convention dealing with matters governed by the draft Convention. For example, a State having ratified or considering ratification of the Ottawa Convention will have to determine whether to give precedence to the draft Convention or to the Ottawa Convention.

2. The Working Group may wish to consider ways in which an overlap between the draft Convention and the Ottawa Convention may be avoided or, at least, minimized. It may be useful to note that the Ottawa Convention applies only to: notification factoring and to factoring transactions in which at least two of the three types of the services mentioned in article 1 are provided (i.e. funding, insurance and bookkeeping); and to the contract of factoring, not to the resulting transfer (thus, it does not deal with priority issues). In addition, the Ottawa Convention applies to such transactions only if: the factoring contract relates to receivables arising from contracts involving the sale of goods and the supply of services; the receivables are international, i.e. the supplier (assignor) and the debtor have their places of business in different States; and all parties involved, i.e. the factor (assignee), the supplier and the debtor have their places of business in Contracting States. It thus seems that, while the scope of application of the Ottawa Convention is rather limited compared with the scope of application of the draft Convention, the transactions falling under the Ottawa Convention would be covered also by the draft Convention.

3. The problems arising from such an overlap would be limited, if the draft Convention were to adopt the same substantive solutions as the Ottawa Convention. However, there are certain differences between the Ottawa Convention and the draft Convention, since under the Ottawa Convention: parties to the factoring contract or the underlying sales contract may exclude the application of the Ottawa Convention as a whole; the validity of the assignment of future receivables or of bulk assignments is recognized only as between the parties to the factoring contract (in other terms, third party-effects of the factoring contract are not covered); the debtor's duty to pay the assignee is triggered by notification and requires that the debtor does not have notice of a superior right of any other person; notification needs to reasonably identify the receivables and the factor; an assignment made despite an anti-assignment clause contained in the sales contract is valid, unless the State in which the debtor is located has made a reservation; the debtor may recover payments from the factor if the factor has not discharged an obligation to make payment to the supplier or if the factor made such payment knowing that the supplier failed to perform the underlying sales contract; subsequent assignments are covered, if the factoring contract is governed by the Convention and does not contain an anti-assignment clause.

4. In view of the above, it appears that a State which wishes to adopt both conventions and give precedence to the Ottawa Convention would have to accept that its law on certain types of factoring contracts covered by the Ottawa Convention will be somehow different from its law on factoring and other contracts falling outside the scope of the Ottawa Convention. Alternatively, a State would have to give precedence to the draft Convention, in order to address a wide variety of transactions and to benefit, e.g., from the priority provisions contained in the draft Convention.

5. Similarly, the Working Group may wish to consider ways in which an overlap with the Rome Convention may be avoided. Under article 12(1) of the Rome Convention, "the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person" are governed by the law which under the Convention applies to the contract of assignment (i.e., under article 4, the law chosen by the parties and, in the absence of a choice of law, the law of the country with which the contract of assignment is most closely connected). The law governing the right to which the assignment relates (i.e. the law applicable to the contract under which the right arose) governs its "assignability, the relationship between the assignee and the debtor, the conditions under which the assignment shall be invoked against the debtor and any question whether the debtor's obligations have been discharged" (article 12(2)).

6. The conflict between article 12 of the Rome Convention and draft articles 29 and 30 of the draft Convention seems to be more a matter of drafting and less a matter of policy and could be avoided if those draft articles were slightly reformulated to be brought in line with article 12 of the Rome Convention.

7. With regard to potential conflicts with draft article 31, the situation is different, since it is not clear whether the Rome Convention addresses issues of priority and, if so, what is the law applicable. Under one view, article 12 does not, and cannot, cover priority issues in that it deals with the contract of assignment and not with the transfer of property in receivables; thus, there can be no conflict with draft article 31. Under another view, article 12 covers priority issues and subjects them either to the law governing the receivable or to the law chosen by the parties to the assignment. In either case, in typical receivables financing transactions involving bulk assignments, it would be very difficult for third parties to ascertain the law applicable and the application of any of those two laws would produce inconsistent results. Thus, it is arguable whether application of either of those two laws would be appropriate or even compatible with the main goal of the draft Convention to ensure certainty and predictability, thus reducing the cost and increasing the availability of credit.

8. Under the circumstances, it may be argued that a rule along the lines of draft article 31 would be a welcome opportunity, even to States parties to the Rome Convention, to, at least, attempt to settle an issue, which has raised so much uncertainty. In any case, the fact that some States consider that they have been able to resolve this matter in one way does not mean that other States should be precluded from addressing it themselves and possibly resolving it in a different way. In order to accommodate both categories of States, the Working Group might wish to allow States to enter a reservation as to the application of chapter VI.

* * *

Article 43. Application of chapter VII

If chapter VII is retained and States are given various options as to how to use sections I and II, the Working Group may wish to consider rephrasing draft article 43 in order to allow States to opt into both the registration-based priority rules and the registration rules or only to the registration rules, applying their own domestic, registration-based, priority rules (see remark 3 to chapter VII).

* * *

Article 44. Insolvency rules or procedures not affected by this Convention

In case variant A is retained in draft article 24, draft article 44 may not be necessary, since the general wording of variant A should cover all rights of the insolvency administrator existing under the law governing insolvency. Draft article 44 may be necessary, if variant B is preferred in draft article 24, provided that it is considered that the list of rights referred to in variant B is not, and cannot, be all-inclusive.

* * *

Article 48. Reservations

The Working Group may wish to consider whether reservations should be allowed, e.g., with regard to draft article 9, in case written form is introduced, or 12, in case no agreement is reached on the present wording or on the exceptions to the rule contained in draft article 12, or chapter VI, in case no agreement is reached on its scope or contents.

* * *